

No. 05- 05 - 899 JAN 11 2006

IN THE OFFICE OF THE CLERK
Supreme Court of the United States

BALDWINVILLE CENTRAL SCHOOL DISTRICT,
CATHERINE McNAMARA ELEMENTARY SCHOOL,
ROBERT CREME, individually, and in his official capacity
as principal of CATHERINE McNAMARA ELEMENTARY
SCHOOL, and THEODORE GILKEY, individually, and in his
official capacity as Superintendent for Baldwinsville School Board
of Education,

Petitioners,

v.

ANTONIO PECK, a minor by and through his parents
and next friends, JOANNE PECK
and KENLEY LESTER PECK,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Second Circuit correctly interpreted this Court's decision in *Hazelwood School District v. Kuhlmeier* – in accord with the Eleventh Circuit but in conflict with the First and Tenth Circuits and at least one panel of the Ninth Circuit – to hold that it is, *prima facie*, unconstitutional under the Free Speech Clause of the First Amendment for public school educators to place viewpoint-based restrictions on school-sponsored speech, *even if* those restrictions are reasonably related to legitimate pedagogical concerns.

2. Whether the Second Circuit correctly held that a public school kindergarten student may have a right under the Free Speech Clause of the First Amendment to display a picture of Jesus Christ on the wall of a school cafeteria during a kindergarten environmental assembly, even though the Second Circuit found that the child's picture of Jesus was nonresponsive to the assignment his teacher had given her students to create posters for the assembly showing what they had learned in class about conserving natural resources and keeping the environment clean.

PARTIES TO THE PROCEEDINGS

Petitioners Baldwinsville Central School District, Catherine McNamara Elementary School, Robert Creme, the former principal of Catherine McNamara Elementary School, and Theodore Gilkey, the former superintendent for Baldwinsville Central School District, were the defendants and appellees below.

Respondents Antonio Peck, a minor, and his parents, Jo Anne Peck and Kenley Lester Peck, were the plaintiffs and appellants below.

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Baldwinsville Central School District, Catherine McNamara Elementary School, Robert Creme and Theodore Gilkey (collectively, the "School District") respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the Second Circuit reversing the district court's judgment is reported at 426 F.3d 617 and reprinted in the appendix hereto ("App.") at 1a. The opinion of the district court granting the School District's motion for summary judgment is unreported and is reprinted at App. 37a.

STATEMENT OF JURISDICTION

The judgment of the court of appeals was entered on October 18, 2005. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The First Amendment to the U.S. Constitution states, in pertinent part, that "Congress shall make no law . . . abridging the freedom of speech."¹

1. The First Amendment has, of course, been applied to state governments through the Fourteenth Amendment, *see, e.g., Cantwell v. Conn.*, 310 U.S. 296, 303 (1940), and plaintiffs seek redress pursuant to 42 U.S.C. § 1983.

INTRODUCTION

At stake here is the authority of public school teachers to conduct curricular activities so that our children "learn whatever lessons the activity is designed to teach." *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 271 (1988). The decision below effectively robs teachers of that authority, in the name of students' right to "free speech." Remarkably, we have come to this moment in a lawsuit over a kindergartner's homework.

Six years of litigation, two district court opinions and two appeals to the Second Circuit have come to pass because one afternoon Antonio Peck's kindergarten teacher gave her class a homework assignment and Antonio – or perhaps more accurately, his mother² – chose to do something else. Antonio's teacher told her class to make posters showing what she had taught them about picking up trash, turning off faucets, and keeping the environment clean. The posters were to be displayed at the kindergarten's environmental assembly in the school cafeteria, to which parents were invited to see what their children had learned.

In response to the assignment, Antonio submitted a poster which he made with his mother, and which consisted entirely of religious pictures and messages, including a picture of Jesus Christ kneeling in prayer, and the handwritten message "The Only Way to Save Our World." App. 74a. The poster was not responsive to the assignment, and Antonio's teacher asked him to make a new one. He did so, again with his

2. The Second Circuit concluded that school officials "made a reasonable determination that Jo Anne Peck (and not Antonio) was responsible for the poster's content." App. 25a.

mother's help. Antonio's second poster contained pictures of people picking up trash, recycling, and holding hands around the earth. But on the left side of the poster was the same picture of Jesus that had been the focus of Antonio's first poster. App. 75a. The School District displayed Antonio's second poster at the kindergarten environmental assembly, but it was folded so that the picture of Jesus was not visible. App. 76a.

The Second Circuit found that the picture of Jesus was not responsive to the poster assignment Antonio's teacher had given, and that the School District's conduct was not motivated by hostility toward religion. App. 21a, 35a. Nonetheless, the Second Circuit, evidencing its clear misunderstanding of this Court's decision in *Hazelwood*, vacated the district court's dismissal of Antonio's free speech claim, and remanded that claim for trial, to determine if the School District restricted Antonio's "speech" based on his "viewpoint," and, if so, whether the School District could justify its actions with a "compelling state interest." App. 23a-33a.

In *Hazelwood*, this Court recognized that the authority to conduct curricular activities properly rests with teachers, not students, and accordingly held that "educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns," 484 U.S. at 273. But in its decision below, the Second Circuit found an exception that swallows the rule: any viewpoint-based restriction on school-sponsored speech "is, prima facie, unconstitutional, *even if* reasonably related to legitimate pedagogical interests." App. 31a.